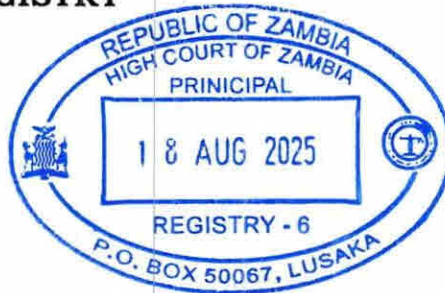


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2023/HP/1140

BETWEEN:

**FRANK MTONGA****PLAINTIFF**

AND

ZIZI NETS ZEWDI PROPERTY GROUP LIMITED
(T/A Hillview Shopping Mall)

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 18th DAY OF AUGUST,
2025**

For the Plaintiff : Mr M. Chibwe, Messrs Ilunga and Company

For the Defendant : Mr H.M. Munsanje, Messrs Munsanje and Company

J U D G M E N T

CASES REFERRED TO:

1. *Blyth v Birmingham Water Works Company* 1856 1 Ex 781
2. *Scott v London Dock* 1865 3 H and C 601
3. *Overseas Tankship (UK) Limited v Morts Docks & Engineering Co (The Wagon Mound Rule No 1)* 1961 1 ALL ER 404
4. *Donoghue v Stevenson* 1932 AC 562
5. *Grant v Australian Knitting Mills Limited* 1936 AC 85, 103
6. *British Railways Board v Herrington* 1972 AC 877
7. *Stone v Taffle* 1974 1 WLR 1575
8. *Caparo Industries Plc v Dickman* 1990 2 WLR 605, 617-618
9. *Zambia National Building Society v Ernest Mukwamataba Nayunda* 1993 SJ 33
10. *Zambia Railways Limited v Pauline S. Mundia and Brian Sialumba* 2008 Vol 1 ZR 287
11. *Anthony Mwanza v Kugurusu Farming Enterprises & another* 2008/HP/715
12. *Attorney General v Judith Chibalabala SCZ Judgment No 11 of 2014*
13. *Naomi Malama v Edwin Chinda Chisenga Appeal No 135 of 2017*

LEGISLATION REFERRED TO:

1. ***The Occupiers Liability Act Chapter 70 of the Laws of Zambia***

OTHER WORKS REFERRED TO:

1. ***Black's Law Dictionary 9th Edition by Bryan A. Garner, Thomas Reuters, 2009***
2. ***Charlesworth and Percy on Negligence London, Sweet and Maxwell 2010***
3. ***Clerk & Lindsel on Torts, 20th Edition, Thomas Reuters, 2010***
4. ***Halsbury's Laws of England, Vol 34, 4th Edition***
5. ***Tort Law by Catherine Elliot and Frances Quin 7th Edition, Pearson Longman, 2009***

1. INTRODUCTION

1.1 Following an accident that happened at the entrance of Hillview Shopping Mall in Chalala Lusaka, Frank Mtonga, the Plaintiff herein, on 30th June, 2023, commenced this action against Zizi Nets Zewdi Property Group Limited, trading as Hillview Shopping Mall, by Writ of Summons which was accompanied by a statement of claim and the other requisite documents seeking:

- i. Damages for personal injuries which were sustained on 22nd December, 2021, while Frank Mtonga was a visitor at Zizi Nets Zewdi Property Group Limited's premises and which were caused by the negligence or breach of statutory duty of Zizi Nets Zewdi Property Group Limited as occupier of the premises known as Hillview Shopping Mall situated in Chalala area of Lusaka;*
- ii. Alternatively, damages for negligence;*
- iii. Damages for loss of earning capacity, medical expenses and out of pocket expenses; and*

*iv. Costs.***2. STATEMENT OF CLAIM**

- 2.1 Frank Mtonga stated that he is a Chartered Accountant by profession, and that he was a visitor at the premises for Zizi Nets Zewdi Property Group Limited, known as Hillview Shopping Mall, located in Chalala, Lusaka.
- 2.2 It was also averred that Zizi Nets Zewdi Property Group Limited was the occupier of the said premises which operated as a shopping mall, and was accessible to the public.
- 2.3 Frank Mtonga stated that on 22nd December, 2021, whilst he was in the company of Humphrey Lumbwe, he drove into Hillview Shopping Mall, adding that each of them drove their own vehicle. It was his averment, that they went there to patronize a drinking place known as Panthers Pub and Grill, which operated as a night club.
- 2.4 Still in averring, Frank Mtonga stated that the vehicles were parked in designated parking slots before the duo proceeded to Panthers Pub and Grill. Then thereafter, the two decided to change the place where they were patronizing, and to later return to Panthers Pub and Grill, as it operated as a night club.
- 2.5 It was stated that Frank Mtonga informed the security guard, Evans Nzima who was on duty when they were leaving, that they would return to Panthers Pub and Grill. The averment was that, that was how they left one of the motor vehicles, and they drove off in the other.

- 2.6 Then a few hours later, when they returned to Hillview Shopping Mall, they found the gate at the entrance of the premises closed.
- 2.7 Frank Mtonga's assertion was that on finding the gate closed, he had sounded the horn of the motor vehicle, in an attempt to alert the security guard on the premises, so that he could retrieve the other motor vehicle that had remained on the premises.
- 2.8 However, as there was no response, Frank Mtonga went towards the gate so that he could check through the peep hole for the whereabouts of the security guard.
- 2.9 His assertion was that at that point, the gate fell on him, and he was pushed all the way to the ground, with his head down until the gate was lifted away by Humphrey Lumbwe and other people.
- 2.10 The contention was that Frank Mtonga later learnt that it was not the first time that the gate had fallen off, as other persons had previously been victims.
- 2.11 Frank Mtonga stated that prior to the incident, he was working as a Chartered Accountant at the Ministry of Health-GAVI Project, where he was overseeing Three (3) provinces, namely Luapula, Muchinga and Northern Provinces, with a total of Twelve (12) districts which required constant travel out of Lusaka.
- 2.12 It was contended that Frank Mtonga suffered life threatening injuries, as a result of Zizi Nets Zewdi Property Group

Limited's negligence and/or breach of statutory duty, which it and or its' servants and agents owed.

2.13 The particulars of breach were stated as:

- i. Failing to maintain the gate in good condition at the premises;
- ii. Failing to take down the loose parts of the gate or to take any other steps to prevent the same from falling;
- iii. Failing to inspect the gate regularly, or at all;
- iv. Failing to give any warning to Frank Mtonga and/or the public, that the said gate was dangerous despite the knowledge that the gate had previously fallen on other person(s); and
- v. By reason of the foregoing, not only being negligent, but failing to discharge the common law duty of care to Frank Mtonga and in breach of the **Occupiers Liability Act, Chapter 70 of the Laws of Zambia.**

2.14 The averment was that as a consequence, Frank Mtonga had suffered pain and injury, as well as loss and damage.

2.15 The particulars of loss were stated as:

- i. Diminished earning capacity as Frank Mtonga's capacity to fully execute his work/duties in his profession as an Accountant had greatly reduced, due to the impact of trauma in the brain leading to partial loss of his eye sight;
- ii. Being unable to drive due to blurred vision;
- iii. Permanent loss of eyesight in the right eye;

- iv. Extensive damage to the left eye with high possibility of permanent loss of sight in future;
- v. Medical expenses; and
- vi. Transportation costs.

3. DEFENCE AND COUNTERCLAIM

- 3.1 In defence, Zizi Nets Zewdi Property Group Limited stated that it made no admission, in so far as Frank Mtonga's profession, as the same was within his distinctive knowledge.
- 3.2 Zizi Nets Zewdi Property Group Limited denied that Frank Mtonga was a lawful visitor at its' premises within the meaning or for purposes of the ***Occupiers Liability Act Chapter 70 of the Laws of Zambia.***
- 3.3 The assertion was that at the material, Frank Mtonga was a trespasser upon the said premises.
- 3.4 It was denied that Zizi Nets Zewdi Property Group Limited was in occupation or control of the said premises known as Hillview Shopping Mall as alleged or at all.
- 3.5 Further denial was made to the assertion that on 22nd December, 2021, Frank Mtonga and Humphrey Lumbwe drove into the premises in two separate cars to patronize at Panthers Pub and Grill, which operated as a night club.
- 3.6 Zizi Nets Zewdi Property Group Limited further denied that the two motor vehicles were parked in designated parking slots on the premises before Frank Mtonga and Humphrey Lumbwe went into Panthers Pub and Grill, and they later decided to go to another place, with a view to returning to

Panthers Pub and Grill, as it would still be open as it operated as a night club.

- 3.7 No admission was made, as regards Frank Mtonga's assertion that he had conversed with the security guard at the premises, Evans Nzima on leaving one car on the premises, stating that the said Evans Nzima was not an employee of Zizi Nets Zewdi Property Group Limited. Thus, he had no authority to permit Frank Mtonga to park his motor vehicle or to allow him to re-enter after the premises had closed.
- 3.8 The defence was further that Zizi Nets Zewdi Property Group Limited, did not admit that Frank Mtonga and Humphrey Lumbwe returned to the premises a few hours later, and they found that the gate at the premises was closed.
- 3.9 Also denied, was Frank Mtonga's averment that he had hooted so that the guard could go and open the premises in order for Frank Mtonga to retrieve the motor vehicle that he had left parked on the premises.
- 3.10 Further denial was made, that as there was no response, Frank Mtonga proceeded to the gate, so that he could check on the whereabouts of the security guard through the peep hole, and the gate fell on him and pushed him down to the ground with his head down, and it was only lifted by Humphrey Lumbwe and others.
- 3.11 The assertion by Frank Mtonga that he later learnt that the said gate had previously fallen off as some other person(s) had been victims, was also denied.

- 3.12 Zizi Nets Zewdi Property Group Limited still in defence, stated that it was within Frank Mtonga's peculiar knowledge, that prior to the incident, he was working as a Chartered Accountant at the Ministry of Health-GAVI Project where he was overseeing Luapula, Muchinga and Northern Provinces, with a total of Twelve (12) provinces, which required constant travel out of Lusaka.
- 3.13 The particulars of negligence and/or breach of statutory duty under the ***Occupiers Liability Act Chapter 70 of the Laws of Zambia*** was denied.
- 3.14 Also denied, were the particulars of the alleged injury, loss and damage.
- 3.15 The defence in the alternative, was that the injuries, loss and damage that Frank Mtonga suffered, which if any, were denied, were caused or alternatively contributed to by the negligence of Frank Mtonga, who was aware or ought to have known of the existence of a signage, which was displayed at the premises, inter alia, discharging Zizi Nets Zewdi Property Group Limited's duty of care to all the lawful visitors who entered the premises.
- 3.16 The particulars in that regard were stated as:
- i. Attempting to enter the premises when Frank Mtonga knew or ought to have known that the premises were closed at the material time to the public for trading, and into which he had no invitation or licence, express or implied to enter;

ii. Attempting to forcibly open the gate which at the time was closed and locked.

3.17 Zizi Nets Zewdi Property Group Limited counterclaimed that as a result of Frank Mtonga's unlawful action of attempting to forcibly open the gate to the premises, resulting in damage thereto, he caused labour costs to be incurred in the sum of Two Thousand Seven Hundred Kwacha (K2, 700.00).

3.18 The counterclaim was stated as:

- (i) Special damages in the sum of K2, 700.00;
- (ii) Costs.

4. DEFENCE TO THE COUNTERCLAIM

4.1 Frank Mtonga joined issue with Zizi Nets Zewdi Property Group Limited on its' defence, so far as the same consisted of admissions, and Frank Mtonga repeated the contents of the statement of claim up to his averment that he went out to the gate when there was no response from the security guard, and the gate fell on him, and pushed him head down until Humphrey Lumbwe and others went and lifted it off him.

4.2 The defence as regards the particulars of negligence as stated against Frank Mtonga, was that this was denied, with Frank Mtonga repeating that he went to the premises on 22nd December, 2021 with Humphrey Lumbwe with each one of them driving separate motor vehicles.

4.3 Thus, the defence to the counterclaim was as above, and Frank Mtonga disputed the claim for special damages,

stating that in any event, they had not been particularised as required by law.

5. EVIDENCE LED AT TRIAL

5.1 At trial, Frank Mtonga testified and he called two witnesses, while Zizi Nets Zewdi Property Group Limited called two witnesses.

PW1-FRANK MTONGA

5.2 Frank Mtonga produced his witness statement as his evidence before Court. In that witness statement, he testified that on 22nd December, 2021, he went and joined his friend Humphrey Lumbwe and they proceeded to their usual drinking place called Panthers Pub and Grill, which was located at Hillview Shopping Mall along Lilayi Road in Chalala.

5.3 His evidence was that whilst at Panthers Pub and Grill, Humphrey Lumbwe and himself, momentarily decided to leave the said Panthers Pub and Grill for Lewanika Mall along Mosi-O-Tunya road in Lusaka. Frank Mtonga added that they decided use one car as it was more convenient.

5.4 In his continued testimony, Frank Mtonga stated that he informed the security guard who was on duty, that they would be returning to Panthers Pub and Grill shortly, and therefore, they would leave one motor vehicle parked at the premises, and they would go in the other motor vehicle.

5.5 Frank Mtonga testified that Humphrey Lumbwe and himself returned to Hillview Shopping Mall after a few hours, and they found the entrance to the premises closed.

- 5.6 As pleaded in the statement of claim, Frank Mtonga testified that he sounded the horn of the motor vehicle in an attempt to alert the security guard who was on the premises, so that he could retrieve the motor vehicle which had remained parked on the premises.
- 5.7 It was stated that as there was no response, he went to the gate with a view to check through the peep-hole for the whereabouts of the security guard. Frank Mtonga's testimony was that at that point, the gate fell on him and it pushed him all the way to the ground, as could be seen from the CCTV footage which was at page 1 of his bundle of documents.
- 5.8 Further in his evidence, Frank Mtonga stated that on 22nd December, 2021, he was taken to the University Teaching Hospital (UTH) where he was admitted for observation, and later the Doctor requested that he undergoes a Computed Tomograph Scan (CT Scan). He testified that analysis of that scan was at page 14 of his bundle of documents.
- 5.9 In his continued testimony, Frank Mtonga stated that the results of the CT Scan showed that he had a bifrontal contusion evidence of raised intracranial pressure, entailing that he had sustained a bruise on the frontal lesion of his brain.
- 5.10 Frank Mtonga still on the injuries that he sustained, testified that this led to bleeding, which caused an increase in pressure.

- 5.11 He told the Court that on his discharge, he was given some medication, which included pain killers and his wife Chanda. Frank Mtonga stated that the analysis by the doctor of the CT Scan was at page 14 of his bundle of documents.
- 5.12 Continuing with his evidence, Frank Mtonga's testimony was that he was re-admitted on 6th January, 2022, as he was experiencing terrible headaches, and his sight had become poor. Additionally, he was falling in and out of consciousness, which was documented at page 14 of his bundle of documents.
- 5.13 The evidence that was further given, was that on Frank Mtonga's re-admission on 6th January, 2022, the Neurosurgeons at UTH had requested that Frank Mtonga undergoes another CT Scan, whose results showed that the mass effect of the gate falling on his head had increased, and had thereby worsened the pressure in his head, which had affected his brain. Again, reference was made to the medical report which was at page 14 of Frank Mtonga's bundle of documents.
- 5.14 Frank Mtonga also in his testimony, stated that at UTH, he was advised to visit the eye hospital to get expert evaluation and help, as his eyes had continued to deteriorate.
- 5.15 That was how, on 22nd January, 2022, he visited Dr Agarwal's Eye Hospital, where he was diagnosed with Papilledema associated with increased intracranial pressure, Malcular Oedema, as well as Tersons Syndrome.

- 5.16 It was stated that the doctor had explained to Frank Mtonga, that the optic disc in his eyes, as well as his macular were swollen, and that he needed an injection due to the swelling of the nerves, which injection was administered.
- 5.17 As evidence of this, reference was made to the Out-Patient Department (OPD) summary, which was at pages 2-3 of Frank Mtonga's bundle of documents.
- 5.18 Further testimony was given, that on 24th January, 2022, Frank Mtonga went for consultation at the Seventh Day Adventist Clinic (Lusaka Eye Hospital) where he was diagnosed with Macular Oedema, and he was prescribed Three (3) doses of intravitreal avastin in each eye. Page 4 of Frank Mtonga's bundle of documents was identified as the diagnosis by the doctor.
- 5.19 He went on to state that he was given Three (3) doses of injections, that is Three (3) in each eye, over a period of Three (3) months at the Lusaka Eye Hospital.
- 5.20 Still on the medical treatment that he received, Frank Mtonga testified that on 29th April, 2022, he underwent eye examination at the Lusaka Eye Hospital, which the doctor referred to as Ganglion Cell Ou Analysis, and he identified pages 5-9 of his bundle of documents, as the results of the said examination, which showed a reduction in the thickness of the nerves that are responsible for eyesight.
- 5.21 It was also Frank Mtonga's testimony that on 11th May, 2022, during his last review, the doctor had explained to him that although the Macular Oedema had dissolved, his vision

had remained very poor. His evidence was further that, an examination of his eyes, revealed that the vision in his right eye was 6/60, meaning that a person with normal eyesight could see at 60 metres, but he could only see at 6 metres in the right eye. This he testified, was shown at page 4 of his bundle of documents.

- 5.22 Frank Mtonga's evidence was also that the vision in his left eye was normal, but however, the Retinal Nerve Fiber Layer (RNFL) thickness in both eyes had reduced further.
- 5.23 He testified that he went back to UTH in August, 2022, and he was informed that although the fluid in his head that had caused pressure had reduced, the nerves were still very weak, and that he would need spectacles.
- 5.24 It was also stated that when Frank Mtonga went back for review at UTH on 23rd August, 2022, he underwent another CT Scan which revealed that he had Papilledema Macular Oedema due to the trauma that he suffered by the gate falling on him.
- 5.25 His evidence was that he received Three (3) doses of medicine after a general examination. Frank Mtonga still in testifying, stated that the doctor noted that the spectacles had not improved his vision, and a report was given as shown on the out-patient report which was at page 10 of his bundle of documents.
- 5.26 It was also his testimony, that on 20th October, 2022, another set of examinations was conducted on his eyes, which revealed that his right eye had become completely

blind. Evidence in support of that position, was stated as being at page 17 of Frank Mtonga's bundle of documents.

- 5.27 Frank Mtonga added that the said document showed that his right eye had 51 out of 52 defects, as well as the normal vision of a person who had good eye sight.
- 5.28 His evidence was further that his vision of a picture was shown to him. The continued testimony that was given, was that the Elisar Vision Report, also showed that his left eye was becoming blind, which report was at page 15 of his bundle of documents.
- 5.29 As pleaded in the statement of claim, Frank Mtonga's evidence was that he learnt during the ordeal, that it was not the first time that the gate had fallen in the manner that it did with him.
- 5.30 He stated that the injuries that he sustained after the gate fell on him had left the activity in his right eye diminished, as it was completely blind and his left eye was blurred. Thus, he was unable to perform his usual tasks, such as driving and providing for his family.
- 5.31 In support of that position, Frank Mtonga's testimony was that prior to the incident, he had been working as a Chartered Accountant at the Ministry of Health-GAVI Project under which he oversaw Three (3) provinces; namely, Luapula, Muchinga and Northern Provinces, with a total of Twelve (12) districts, and which required constant travel out of Lusaka.

- 5.32 Frank Mtonga testified that however, due to the state of his eyes, he could not perform his work without someone else's assistance, and he could not drive, as he was previously required when carrying out his job.
- 5.33 His testimony was further that he had spent money on medical expenses, as well as in transport costs moving from one hospital to another. He added that this also extended to general movements due to his eye sight.
- 5.34 In concluding his testimony, Frank Mtonga testified that as shown on the Patents and Companies Registration Agency (PACRA) print out, which was at pages 32-33 of his bundle of documents, the premises where the incident happened, known as Hillview Mall, belonged to Zizi Nets Zewdi Property Group Limited.

CROSS EXAMINATION OF FRANK MTONGA

- 5.35 It was Frank Mtonga's evidence when he was cross examined, that on 22nd December, 2021, between 20:00 hours and 21:00 hours, he went to Panthers Club. He stated that it was a club and not a bar and restaurant. It was also his testimony that the operating hours at the premises were not specified, but depended on the number of people who were there.
- 5.36 On being referred to page 4 of Zizi Nets Zewdi Property Group Limited's bundle of documents, his evidence was that he did not recognise the logo on the page.
- 5.37 Frank Mtonga disagreed that the hours as stated at page 2 of Zizi Nets Zewdi Property Group Limited's bundle of
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documents were the operating hours for Panthers club, stating that they were not indicated anywhere.

- 5.38 His continued testimony in cross examination, was that he went to Lewanika Mall from Panthers Club around 21:00 hours, after having spent some time at Panthers Club.
- 5.39 As to name of the guard that he spoke with at the premises, Frank Mtonga's testimony was that it was Evans Nzima. His testimony was that Evans Nzima did not allow him to leave his car on the premises, but rather that Frank Mtonga had informed Evans Nzima that he would leave the car on the premises and he would return. His position was that Evans Nzima did not object.
- 5.40 It was stated that Frank Mtonga did not know Evan Nzima's employer at the time, or whether Evans Nzima had authority to allow people to leave their vehicles on the premises.
- 5.41 He explained that Humphrey Lumbwe's car was left at the premises, and Frank Mtonga denied that the said vehicle belonged to his uncle.
- 5.42 Further in cross examination, Frank Mtonga stated that he drove from Hillview Shopping Mall to Capelo at Lewanika Mall, adding that they returned to Hillview Shopping Mall around 23:00 hours.
- 5.43 On the CCTV footage, which was at page 1 of Frank Mtonga's bundle of documents being played, Frank Mtonga testified that he obtained it through his uncle, who visited the said premises.
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- 5.44 When asked to read the time that was indicated on the footage, Frank Mtonga testified that he was unable to read it, as he could not see. His position was that Counsel had stated that the time that was indicated on the footage was 01:05 hours on 22nd December, 2021.
- 5.45 Whilst agreeing that he was with his friend Humphrey Lumbwe, Frank Mtonga denied that he tampered with the gate. It was his evidence that he peeped through the gate to see on the other side, so he touched the gate.
- 5.46 Still in cross examination, Frank Mtonga testified that the gate had gaps, and that he did not know what a palicid fence was. He stated that the fence was made of brick, and it had wire, but that if one was outside the fence, they could not see inside.
- 5.47 Frank Mtonga stated that he was unable to see inside from the peep hole, as the gate fell on him, after he touched it.
- 5.48 It was Frank Mtonga's evidence, when he was again referred to the video footage, that on the time indicated as 00:59 hours, headlights of a car could be seen. He testified that he probably arrived at that time. Frank Mtonga's testimony was that at 01:03 hours, the car headlights turned off, and at 00:19 hours, the peep hole was opened.
- 5.49 Still with reference to the video footage, Frank Mtonga testified that at 00:26 hours, the gate started opening, and at 00:32 hours, the gate fell.

- 5.50 Frank Mtonga agreed that the footage did not show anyone going to his help, and his position was that the footage did not depict everything that happened that night.
- 5.51 Further in cross examination, Frank Mtonga agreed that he had no direct evidence to show that the gate was not properly maintained, and he stated that in the video, the staff could be heard stating that the gate fell on the guard. He also agreed that he had no evidence to show that the gate had loose parts.
- 5.52 Frank Mtonga's testimony was that he did not know if he was permitted to be at the premises at that hour. He told the Court that he drove the car from Lewanika Mall, and that after the incident, Humphrey Lumbwe drove it.
- 5.53 It was also his evidence that he was unconscious, and therefore, he did not know where they went from there. The evidence that Frank Mtonga further gave, was that he regained consciousness after Three (3) weeks. He could not recall what drinks he took at Panthers Club, but clarified that they were alcoholic.
- 5.54 As for the reason, why they went to Lewanika Mall, Frank Mtonga stated that it was because they went to meet a friend there, adding that he did not drink from there.
- 5.55 With regard to his employment, with the Ministry of Health, Frank Mtonga testified that he was employed at the Project, from July, 2018 to September 2023. Therefore, he was no longer working there.

- 5.56 In respect of how much he earned, it was Frank Mtonga's testimony that his net salary was about Thirty Thousand Kwacha (K30, 000.00) a month. He also testified that the project ended in June, 2023, but it was extended to September, 2023.
- 5.57 Frank Mtonga further in cross examination, stated that he attended at Dr Agarwal's eye clinic on a date that he did not recall, stating that he was not in good condition, and his wife and other people would take him there. He explained that prior to that, he had never attended there.
- 5.58 When referred to the image which was at page 32 of his bundle of documents from Dr Agarwal's eye hospital, Frank Mtonga's evidence was that the date 1st January, 2003 which was indicated on the document, was probably an error, and that he would bring an expert to explain the said error.
- 5.59 The evidence that was given in conclusion, was that Frank Mtonga was no longer in employment.

PW2-HUMPHREY LUMBWE

- 5.60 This witness also identified his witness statement and he produced it as his testimony.
- 5.61 It was his testimony, in that witness statement, that he joined Frank Mtonga at Panthers Club which was located at Hillview Shopping Mall along Lilayi Road in Chalala. Humphrey Lumbwe confirmed Frank Mtonga's evidence that they had decided to go to Lewanika Mall which is along Mosi-O-Tunya Road in Woodlands, and that for that purpose, they would use one car, as it was more convenient.

- 5.62 Humphrey Lumbwe also testified that Frank Mtonga had informed the security guards who were on duty upon leaving, that Frank Mtonga would return to Panthers Club shortly, and therefore, they would leave one car parked, and they would go with the other.
- 5.63 Still in his testimony, Humphrey Lumbwe stated that when they returned to Hillview Shopping Mall, they had found the gate at the premises closed. He reiterated Frank Mtonga's evidence that Frank Mtonga had hooted, adding that when he realised that no one was going to open the gate, Frank Mtonga decided to go out and look through the peep hole of the gate, in order to check if there was anyone within the premises.
- 5.64 Humphrey Lumbwe's evidence was that as soon as Frank Mtonga was about to look through the peep hole, the gate suddenly collapsed on him, and he was unconscious. It was also stated that in less than one minute afterwards, Frank Mtonga gained consciousness.
- 5.65 In still testifying, Humphrey Lumbwe's evidence was that he attempted to do a quick assessment, so as to determine whether Frank Mtonga was okay, and he accordingly asked him what his name was, and he had responded that he was Frank. He further testified that he had asked Frank Mtonga if he remembered where he was at that particular moment, and he had responded that he did not know where he was.
- 5.66 On what other questions Humphrey Lumbwe had asked Frank Mtonga, he testified that he had asked him where his

wife was. It was stated that Humphrey Lumbwe had called Frank Mtonga's wife and he had informed her about what had happened, and that they needed to rush to the hospital. His evidence was that he drove to Frank Mtonga's house and picked up his wife, and they proceeded to South Point Hospital in Woodlands Extension.

- 5.67 Humphrey Lumbwe's testimony was further that whilst at South Point Hospital, the doctor had informed Frank Mtonga's wife that his blood pressure was very high, and Frank Mtonga was placed on observation for a few minutes. Then thereafter, he was given pain killers and he was released.
- 5.68 Continuing, with his testimony, Humphrey Lumbwe stated that he drove Frank Mtonga and his wife back to their home, and he had insisted that they proceed to UTH, so that Frank Mtonga could be expertly assessed. Thus, they proceeded to UTH, where Frank Mtonga was admitted for observation, and he was prescribed some medicine, and his wife was told to observe him for Five (5) days.
- 5.69 Humphrey Lumbwe's evidence was that he thereafter left for the Copperbelt, and a few days later, he had called Frank Mtonga's wife to check on Frank Mtonga's progress, and she had informed him that Frank Mtonga's condition was worsening.
- 5.70 In concluding his testimony, Humphrey Lumbwe testified that when Frank Mtonga was admitted, he would visit him

at the hospital regularly to see how he was doing, and that he continued visiting him after he was discharged.

CROSS EXAMINATION OF HUMPHREY LUMBWE

- 5.71 In cross examination, Humphrey Lumbwe testified that he did not recall the exact time that they reached Panthers Club, but that it was just before midnight. He agreed that they were drinking whilst at Panthers Club. It was also his testimony, that he knew Panthers Club, as a drinking place and that he did not know if it was a bar or restaurant, adding that it was open twenty-four hours a day.
- 5.72 Humphrey Lumbwe's testimony, was that when they went back to Panthers Club, the gate was not closed, and that it was unusual to find the gate closed. He was unaware that Panthers Club had operating hours, but stated that it was just a drinking place where they would eat from, and it would operate up till 06:00 hours. Humphrey Lumbwe added that if that was what a restaurant was, then it was.
- 5.73 Coming to the actual day, his evidence was that they stayed at Panthers Club for between One (1) and Two (2) hours, before they went out. He could not recall the names of the security guards who were manning the premises, stating that Frank Mtonga spoke with them about leaving and returning.
- 5.74 Humphrey Lumbwe agreed that on their return, they found the gate closed, and he testified that they had left his car on the premises. It was also agreed that when they returned, they had found the gate closed, and that Frank Mtonga

- started hooting. His testimony was that thereafter, Frank Mtonga disembarked from the car, and he walked to the gate.
- 5.75 Humphrey Lumbwe testified that the premises had a fence which was partially wall and partially with openings, which had grills. It was agreed that one could see inside. Humphrey Lumbwe, stated that Frank Mtonga peeped inside.
- 5.76 Whilst testifying that the guard who was at the premises, and whose name he did not know, allowed them to park the car on the premises, Humphrey Lumbwe did not know if the guard had authority to allow them to leave the vehicle there. He could not recall how long they waited for the guard to open, but stated that it was long enough for Frank Mtonga to go out and peep.
- 5.77 In that regard, Humphrey Lumbwe's evidence was that he saw Frank Mtonga bend over from behind. He told the Court that he could not lift the gate, and after a few seconds, he had called for help. The evidence that Humphrey Lumbwe further gave, was that one person went through, and he had called for others, as the two of them could not lift the gate.
- 5.78 Humphrey Lumbwe testified that he was aware that there was CCTV at the premises, and he therefore assumed that the incident was captured. He explained that when Frank Mtonga fell, the gate completely covered him.
- 5.79 On the injuries that he saw on Frank Mtonga, Humphrey Lumbwe's evidence was that Frank Mtonga had a bruise on his head after they lifted him from under the gate. It was his testimony that when Frank Mtonga regained consciousness,

he had asked for his wife Chanda, and not for any other person. Thus, if someone had said that Frank Mtonga had called someone else, they would be lying.

RE-EXAMINATION OF HUMPHREY LUMBWE

5.80 The clarity that Humphrey Lumbwe gave in re-examination, was that they did not ask for permission to leave the car on the premises, but rather, that they had informed the guard that they would be returning shortly, when they left for Lewanika Mall.

PW3-EVANS JULIUS NGOMA

5.81 Evans Julius Ngoma identified his amended witness statement, and he produced it as his testimony.

5.82 In that witness statement, his evidence was that on 22nd December, 2021, he was on duty under the employ of Armsecure Security, guarding at Choppies Supermarket which was located at Hillview Shopping Mall along Lilayi Road in Chalala, Lusaka.

5.83 Evans Julius Nzima testified that whilst on duty, he went to patrol the premises, and he made rounds in the area, where the generators of the premises were located. He stated that as generators make noise, he was unable to hear any other sound.

5.84 However, when he left the area where the generators were located, and he headed back to the main corridor, he realised that there was a vehicle that was parked at the gate, whose lights were on, and there was a man who was calling for help.

- 5.85 It was his testimony that upon realizing that one side of the gate was down, he knew that the man was probably in trouble, in that the very moment, as it was not the first time that the gate had fallen down.
- 5.86 Evans Julius Nzima further testified that it was a well-known fact among the security guards who manned various shopping outlets at Hillview Shopping Mall, that the gate had a tendency of falling every now and then. He added that even when closing it, they had to push it to a certain extent beyond which, it would fall.
- 5.87 He stated that this could even be heard from the conversations that were exchanged between the security personnel at Hillview Shopping Mall in the CCTV footage which was at page 1 of Frank Mtonga's bundle of documents.
- 5.88 Evans Julius Nzima further testified that each time the gate fell, it would fall on the outer side of the premises and never on the inside.
- 5.89 He went on to explain in the witness statement, that his role was to guard Choppies Supermarket only, as Hillview Shopping Mall had Three (3) other personnel who manned the premises.
- 5.90 As to the incident on the material day, Frank Mtonga stated that he initially thought that the gate had fallen on the legs of the man who was calling for help, but when he got there, he realised that there was a man who was trapped under the gate. Evans Julius Nzima testified that they attempted to lift

the gate, but it was too heavy, and that was how he decided to call his other colleagues for assistance.

5.91 The testimony that was further given, was that they managed to lift the gate, and they pulled out Frank Mtonga, who was unconscious at the time. He stated that Frank Mtonga after a moment, on gaining consciousness, kept asking where Chanda was.

5.92 It was Evans Julius Nzima's evidence, that Frank Mtonga left the premises with Humphrey Lumbwe, and he stated that he never saw them again until May 2022. His testimony was that Frank Mtonga could not even recognise him until he had explained to Frank Mtonga that he went to help pull Frank Mtonga from under the gate.

CROSS EXAMINATION OF EVANS JULIUS NZIMA

5.93 When cross examined, Evans Julius Nzima stated that he was seeing the video footage of the premises for the first time. He stated that the incident happened on 22nd December, 2021, and he was at Hillview Shopping Mall.

5.94 Evans Julius Nzima's evidence was that his employer was Choppies Supermaket, as a night shift security guard. Therefore, he was guarding Choppies Supermarket.

5.95 Still in cross examination, Evans Julius Nzima testified that he had no authority to authorise anyone to park a vehicle at the premises.

5.96 It was his testimony, that he had worked for Choppies Supermarket for two years, and that management for

Choppies Supermarket had allowed him to open the gate at the premises.

- 5.97 Evans Julius Nzima agreed that he had stated in his witness statement, that it was not the first time that the gate had fallen. When cross examined further, his testimony was that he could not recall when it had previously fallen, but stated that when it had fallen, it did not fall on anyone.
- 5.98 On the CCTV footage being played, Evans Julius Nzima testified that he could recognise the premises, stating that the main gate was on the left, and that he could see the bar just in front of him. His further evidence was that he could only see one view of the premises, on the CCTV footage, but that he did not know the number of cameras that were at the premises.
- 5.99 Still on the CCTV footage, Evans Julius Ngoma testified that at 00:59 hours, there were lights for a vehicle. His evidence was that the date on the top left corner was 12:22:21 with the day as Wednesday, and that the other time was 01:07 hours.
- 5.100 In further cross examination, Evans Julius Nzima's testimony was that at 01:03 hours the car lights went off, and at 01:19 hours, there was a hand at the gate.
- 5.101 He did recall, that he heard someone call out for help, but he could not recall what time that was. Evans Julius Nzima nevertheless stated that it was on the same night. In still testifying, his evidence was that if the video was complete, it would have shown him go out to help.

- 5.102 He reiterated his evidence in the witness statement, that he thought that the gate had fallen on the man's legs, but when he went there, he found that man under the gate.
- 5.103 Evans Julius Nzima stated that the man that he found under the gate, was not the one who was shouting for help, but that it was his friend who was doing so. He told the Court that he called security to go and help.
- 5.104 On being referred to paragraph 4 of his witness statement, Evans Julius Nzima testified that he could not recall how long the car headlights were on, as he was behind. It was his testimony that the corridor was about Two (2)-Three (3) metres from the gate.
- 5.105 Evans Julius Nzima stated that he could not answer why he was not in the video walking to the gate. He also told the Court that security could be changed frequently, so he did not know the names of the other guards. He testified that when the first security guard arrived, they had lifted the gate, and thereafter, another security guard went there.
- 5.106 In continued cross examination, Evans Julius Nzima testified that when Choppies Supermarket was open, a lot of customers would ask to leave their vehicles on the premises. His evidence was that he would allow them to park within working hours for security reasons.
- 5.107 It was testified that Evans Julius Nzima could not recall the specific customers who went to ask to park their vehicles on the premises, as a lot of people would ask. He did not recall what time Choppies Supermarket closed on the material

night. Evans Julius Nzima clarified that they would start closing at 20;30 hours and those customers who were inside would be locked inside at the time, and after they were done between 21:00 hours and 21:30 hours, they would leave.

5.108 He also stated that customers and other people would be on the premises after midnight, as the bar would operate until the last customer left. However, on the material night, the gate was closed, as there was no trading activity at the bar. Evans Julius Nzima testified that outsiders would only be allowed in around 03:00 hours when newspapers were taken there for sale.

RE-EXAMINATION OF EVANS JULIUS NZIMA

5.109 Evans Julius Nzima clarified that he did not see the gate fall on Frank Mtonga, but that the gate did fall, and it fell on Frank Mtonga. He further clarified that it was not the first time that the gate fell, as it fell when he was closing the gate after a person with a motor cycle left.

PW4-CHANDA KATONGO MTONGA

5.110 The wife to Frank Mtonga, Chanda Katongo Mtonga identified her amended witness statement, and she produced it as her testimony.

5.111 The testimony that she gave in that witness statement, was that in the early hours of 22nd December, 2021, and slightly after midnight, she was at home when she received a call from Humphrey Lumbwe, who informed her that her husband, Frank Mtonga had had an accident, as a gate had fallen on him, and they needed to rush him to the hospital.

- 5.112 Chanda Katongo Mtonga testified that after a short while, Humphrey Lumbwe had again called her, and informed her that he was at the gate of their house. Thus, Chanda Katongo Mtonga joined Humphrey Lumbwe and her husband, and they proceeded to South Point Hospital in Woodlands Extension.
- 5.113 Then from there, they took Frank Mtonga to UTH, where Frank Mtonga was admitted for observation. She stated that the doctors requested that Frank Mtonga does a Computed Tomography Scan (CT Scan), whose results were at page 14 of Frank Mtonga's bundle of documents.
- 5.114 Chanda Katongo Mtonga further testified that the CT Scan showed that Frank Mtonga had a bifrontal contusion of raised intracranial pressure, meaning that he had sustained a contusion to the frontal region of his brain.
- 5.115 It was further her testimony, that this led to bleeding, causing increased pressure where the brain sits. Chanda Katongo Mtonga's evidence was that Frank Mtonga was discharged, and he was given some medication, which included pain killers. Page 14 of Frank Mtonga's bundle of documents was identified as the doctor's analysis as contained in the medical report.
- 5.116 In her continued evidence, Chanda Katongo Mtonga testified that when Frank Mtonga was discharged, and he was sent home, she noticed that he seemed to have lost his sight. Further, he stopped talking, and started hallucinating and he came in and out of consciousness. Additional
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testimony was given, that Frank Mtonga's behaviour changed towards the family, and he would barely use the toilet correctly, and he would miss steps completely. He also complained about having horrible headaches.

5.117 Therefore, Chanda Katongo Mtonga decided to take Frank Mtonga back to the hospital, and on 6th January, 2022, Frank Mtonga was re-admitted to the hospital, as highlighted in the medical report which was at page 14 of his bundle of documents.

5.118 Further testimony was given by Chanda Katongo Mtonga, that the Neurosurgeons at UTH requested that Frank Mtonga undergoes another CT Scan. She stated that the results of that CT Scan revealed that the mass effect of the gate having fallen on Frank Mtonga had increased, thereby worsening the pressure in his head, and had affected the brain. Reference was again made to the medical report which was at page 14 of Frank Mtonga's bundle of documents.

5.119 It was Chanda Katongo Mtonga's continued testimony, that during the admission, Frank Mtonga's eye sight deteriorated greatly, and he could not recognise anybody, and he would behave as if he was insane. She testified that the doctors had explained this as being due to the intracranial pressure in the brain, and that the video at page 1 of Frank Mtonga's bundle of documents depicted this.

5.120 Chanda Katongo Mtonga further testified that she was advised to take Frank Mtonga to UTH, and that Frank Mtonga also needed to get expert evaluation at an eye

hospital, as his eyes had continued to deteriorate. She explained, that during this period, Frank Mtonga was put on different medications, one which caused him to have seizures and to fit, whenever it was administered to him.

5.121 Further in testifying, Chanda Katongo Mtonga explained that eventually, the seizures reduced, and she was asked to be positioning him carefully, so as to avoid putting pressure on his head.

5.122 On other medical treatment that Frank Mtonga received, Chanda Katongo Mtonga testified that on 22nd January, 2025, she took Frank Mtonga to Dr Agarwal's eye hospital where he was diagnosed with Papilledema associated with increased intracranial pressure, Macular Oedema, as well as Tersons Syndrome.

5.123 It was stated that the doctor had explained that the optic disc in Frank Mtonga's eyes, as well as his Macular were swollen. Accordingly, Frank Mtonga was informed that he needed an injection because of the swelling of the nerves, and the same was administered.

5.124 Reference was made to the Out-Patient Department (OPD) summary, which was at pages 2-3 of Frank Mtonga's bundle of documents, which showed the diagnosis and the advice that the doctor gave.

5.125 Further testimony was given, that on 24th January, 2022, Chanda Katongo Mtonga took Frank Mtonga for consultation at the Seventh Day Adventist Clinic (Lusaka Eye Hospital) stating that there, Frank Mtonga was also diagnosed with

Macular Oedema, as evidenced at page 4 of Frank Mtonga's bundle of documents. Her evidence was that he was prescribed Three (3) doses of intravitreal avastin in each eye as treatment. Chanda Katongo Mtonga stated that the three doses of injections in each eye, were administered to Frank Mtonga, over a period of Three (3) months at the Lusaka Eye Hospital.

5.126 Still on the treatment, that Frank Mtonga received, Chanda Katongo Mtonga's testimony was that she again took Frank Mtonga for eye examinations, at the Lusaka Eye Hospital on 29th April, 2022, which were known as Ganglion Cell Ou Analysis. She testified that the results of that examination, revealed that there was a reduction in the thickness of the nerves which are responsible for eye sight, for Frank Mtonga.

5.127 In that regard, pages 5-9 of Frank Mtonga's bundle of documents was referred to.

5.128 Chanda Katongo Mtonga further testified that during continued review at the Lusaka Eye Hospital, on 11th May, 2022, the doctor had explained to Frank Mtonga that although the Macular Oedema had dissolved, Frank Mtonga's vision remained poor.

5.129 She, like Frank Mtonga, explained that the doctor had stated that the eye examinations showed that Frank Mtonga's vision in his right eye was 6/60, meaning that he could only see at six metres in his right eye, when a person with normal eye sight could see at sixty metres.

- 5.130 As evidence of that position, Chanda Katongo Mtonga referred to page 4 of Frank Mtonga's bundle of documents.
- 5.131 She went on to testify that in August, 2022, she took Frank Mtonga to UTH, where Frank Mtonga was informed that even though the fluid in his head that had caused pressure had reduced, the nerves were still very weak, and that Frank Mtonga would need spectacles.
- 5.132 Chanda Katongo Mtonga's further evidence was that on 23rd 2022, she took Frank Mtonga for review at UTH, where a CT Scan which was done, and which revealed that Frank Mtonga had Papilledema Macular Oedema due to the trauma that he suffered when the gate fell on him.
- 5.133 It was her testimony, that as treatment, Frank Mtonga received Three (3) doses of medicine.
- 5.134 Her evidence was that the doctor had noted that despite being given spectacles, Frank Mtonga's vision had not improved. Page 10 of Frank Mtonga's bundle of documents was referred to as evidence in support of that position.
- 5.135 Chanda Katongo Mtonga in her continued testimony, stated that on 20th October, 2022, another set of examinations were conducted on Frank Mtonga, which showed that his right eye was completely blind.
- 5.136 Page 17 of Frank Mtonga's bundle was stated as being evidence of that fact, with Chanda Katongo Mtonga testifying that the said page showed that Frank Mtonga's eye had Fifty-One (51) out of Fifty-Two (52) defective points, as well as the

normal vision for a person with good eye sight. It was added that Frank Mtonga's vision of a picture was shown to him.

5.137 Chanda Katongo Mtonga testified that the Elisar Vision Report further showed that Frank Mtonga's left eye was also becoming blind, although amounts of light were entering the eye, as shown at page 15 of Frank Mtonga's bundle of documents.

5.138 In still testifying, Chanda Katongo Mtonga stated that from the date that the gate fell on Frank Mtonga, she had had to cater for him every day, as he was unable to perform tasks on his own, due to the loss of sight in one eye and blurred vision in the other eye.

5.139 Her evidence was also that Frank Mtonga's earning capacity had reduced, as his capacity to fully work and to execute his duties in his profession as an Accountant had greatly reduced, due to the impact of the trauma in the brain, leading to his loss of sight in the right eye and partial loss of sight in the left eye.

CROSS EXAMINATION OF CHANDA KATONGO MTONGA

5.140 It was Chanda Katongo Mtonga's evidence in cross examination, that Humphrey Lumbwe called her after midnight when she was sleeping. She testified that Frank Mtonga had held his head, stating that it was paining, and that he had bruises on his face. Her testimony was that other than what she had told the Court, she did not know what happened.

5.141 That marked the close of Frank Mtonga's case.

DW1-AUGUSTINE MULEYA

5.142 This witness, a security guard at Hillview Shopping Mall produced his witness statement as his evidence. He testified that on 21st December, 2021, he had reported for work at Hillview Shopping Mall at 17:30 hours, and he started performing his regular duties of patrolling the premises.

5.143 Then between 01:00 and 02:00 hours, when he was behind One Dollar Shop, which was next to the receiving area for Choppies Supermarket, he heard someone shouting that the gate had fallen.

5.144 Thus, Augustine Muleya proceeded towards the gate where he found Evans Nzima and Bright Nchima, with someone and they were asking that person, whom Augustine Muleya did not recognise, whether he was alright to drive, and he had answered in the affirmative.

5.145 This witness testified that he came to know the said person who was being asked, as Frank Mtonga, and that he got into his car, and he drove off.

CROSS EXAMINATION OF AUGUSTINE MULEYA

5.146 Augustine Muleya in cross examination, testified, when he was referred to paragraphs 1-3 of his witness statement, that he was on duty when the gate fell. He however denied that Evans Julius Nzima went to call him and inform him that the gate had fallen. It was Augustine Muleya's testimony when he was cross examined further, that he did not deny that Evans Julius Nzima went to call him.

- 5.147 He agreed that he did not see the gate fall on Frank Mtonga, but stated that when he went to the gate, he saw a person under it.
- 5.148 Augustine Muleya's testimony was that he could not recall the person who was under the gate facially, as he did not look at them. He added that he found the person standing and that he limped, and Evans Julius Nzima had asked him if he could manage to drive the car, and he had agreed. Thus, the person got into the car, and he drove away.
- 5.149 Augustine Muleya agreed that himself and Zizi Nets Zewdi Property Group Limited did not follow up to check on the well-being of the person. He was unaware that the person had become permanently disabled as a result of the accident. Augustine Muleya was unsure whether the accident happened on 21st December, 2021.

DW2-DAVID KASONDA

- 5.150 David Kasonda, the Manager for Hillview Mall also produced his witness statement as his testimony. He told the Court that he had worked at Hillview Mall for Eight (8) years.
- 5.151 The testimony as contained in his witness statement was that his duties included overseeing the day to day operations, assisting tenants at the premises, and resolving issues that arose.
- 5.152 Further, in his evidence, David Kasonda testified that the task of opening the gate at the premises in the morning at 06:00 hours and closing it at 22:00 hours lay with the security guard who was on duty.

- 5.153 He stated that on 22nd December, 2021, he had reported on duty at Hillview Shopping Mall, and he patrolled the premises as he did routinely. Then around 08:30 hours, he went to check the CCTV footage from the previous night after he was informed about an incident that happened by Edwin Mpimpa.
- 5.154 David Kasonda's testimony was that upon viewing the CCTV footage, he saw Evans Nzima and Bright Nchima rushing to the gate around 01:00 hours, and after sometime, he also saw Augustine Muleya running to the gate.
- 5.155 It was stated that David Kasonda saw them lift the gate back to its' original position, and he saw the car turn its' headlights on, and it drove away.
- 5.156 Further evidence was given by David Kasonda, that on Monday, 27th December, 2021, around 10:00 hours, a gentleman entered the premises and approached him, and he introduced himself as an uncle to Frank Mtonga. It was his testimony that the man had asked him about the incident that happened in the early hours of 22nd December, 2021.
- 5.157 David Kasonda stated that the man had asked if they had CCTV footage, and on David Kasonda agreeing, the man had viewed the same, whilst David Kasonda was in the company of Ruth, an employee of One Dollar Shop at the said premises. Then after the man was allowed to capture the CCTV footage on his phone, he did so and he left.
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CROSS EXAMINATION OF DAVID KASONDA

- 5.158 David Kasonda, in cross examination, testified, when he was referred to paragraph 1 of his witness statement, that he oversaw operations at the mall. He stated that he was aware that the gate fell on Frank Mtonga. David Kasonda agreed that he did not follow up with Frank Mtonga, but that Frank Mtonga approached him.
- 5.159 He told the Court that Zizi Nets Zewdi Property Group Limited had a policy with regard to incidents that happened at the mall. He took the position that it was the first time that the gate fell.
- 5.160 David Kasonda also testified in cross examination, that he checked the CCTV after he was informed about the incident.
- 5.161 On the CCTV footage being played, his evidence was that he had heard the conversation in the third last video, which was part of the footage that he had viewed, stating that voices were heard in the background. He stated that one of the voices was his, and the other was for a worker there.
- 5.162 David Kasonda also testified that he had understood the conversation, and his evidence that it was the first time that the gate fell. Still in cross examination, David Kasonda stated that he was unaware of the damage or injury that Frank Mtonga sustained. He concluded the cross examination by stating that following up with an injured person did not show concern for them.
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RE-EXAMINATION OF DAVID KASONDA

- 5.163 The clarity that David Kasonda gave in re-examination, was that the CCTV footage was not complete, as when the people went with the car, they stopped. He also stated that they touched the small gate, and it was locked, and then they pushed the big gate.
- 5.164 David Kasonda also clarified that he did not see the security officers from Panthers Club go to the gate, so the CCTV footage was incomplete.

6. DECISION OF THIS COURT

- 6.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

- 6.2 It is common cause that Frank Mtonga and Humphrey Lumbwe were in a vehicle outside the premises called Hillview Shopping Mall in Chalala between 21st and 22nd December, 2021, which premises are owned by Zizi Nets Zewdi Property Group Limited.
- 6.3 The facts which are further not in dispute, are that Frank Mtonga disembarked from the vehicle and he touched the gate at the premises which fell on him.
- 6.4 It is not in contention, that Frank Mtonga was lifted from under the gate by Humphrey Lumbwe and security guards who were manning the premises, who included Evans Julius Nzima.
- 6.5 It is also common cause that following the gate having fallen on Frank Mtonga, he was taken to South Point Hospital in

Woodlands by his wife Katongo Chanda Mtonga and Humphrey Lumbwe where he was treated and discharged.

- 6.6 The facts not in dispute are further that Frank Mtonga also received treatment at UTH, Dr Agarwal's eye hospital and the Seventh Day Adventist Eye Hospital.
- 6.7 It is not in contention that Frank Mtonga was diagnosed as having lost in his right eye and that the vision in his left eye had continued to weaken following the treatment that he received.

ISSUES IN DISPUTE

- 6.8 What is in contention is whether Frank Mtonga is entitled to damages for personal injuries which were occasioned due to the negligence and/or breach of statutory duty by Zizi Nets Zewdi Property Group Limited, trading as Hillview Shopping Mall, as occupier of the said premises.
- 6.9 The issues that are further in dispute are whether in the alternative, Zizi Nets Zewdi Property Group Limited is liable to Frank Mtonga in damages for negligence, and also whether it is liable to Frank Mtonga in damages for loss of earning capacity, medical expenses and out of pocket expenses.

ANALYSIS

- 6.10 The evidence on record shows that the evidence as given by Frank Mtonga and Humphrey Lumbwe was that they had initially each driven to Hillview Shopping Mall to patronize at Panthers Pub and Grill. Then after they had stayed there, for some time, they decided to leave and go to Capelo's at

Lewanika Mall with a view to returning to Panthers Pub and Grill as it operated as a night club.

- 6.11 Their testimony was they decided to go to Capelo's in one vehicle, and they informed Evan Julius Nzima, a security guard who was working at Hillview Shopping Mall that they would go in one vehicle, and that they would return to collect the vehicle, that they would leave. Thus, they drove off in one vehicle.
- 6.12 However, on their return to Hillview Shopping Mall, they found the gate at the premises closed. It was Frank Mtonga and Humphrey Lumbwe's testimony that Frank Mtonga sounded the horn of the vehicle so that they could alert the security guard at the premises that they had returned, and he could open for them.
- 6.13 They waited, and when no one went to open, Frank Mtonga disembarked from the vehicle, and he went and peeped through the peep hole to see whether he could see the security guard. When he did not, he decided to open the gate, and when he pushed it, it fell on his head and covered him until Humphrey Lumbwe and the others lifted it from him.
- 6.14 The evidence on record shows that Frank Mtonga was thereafter treated at various hospitals and he was informed that he had lost sight in his right eye, and that he was likely to lose his sight in the left eye.
- 6.15 In defence, Zizi Nets Zewdi Group Limited called as its' witness, Augustine Muleya, one of the security guards who was on duty on the material night. He testified that between

01:00 and 02:00 hours, he heard someone shouting that the gate had fallen, as he was behind One Dollar Shop which was next to the receiving area for Choppies.

- 6.16 He stated that when he went there, he had found Evans Nzima, Bright Nchima and another person who was being asked if he was alright to drive, and he agreed. Then that person whom Augustine Muleya came to know as Frank Mtonga got into the car and he drove away.
- 6.17 David Kasonda who also testified on behalf of Zizi Nets Zewdi Group Limited, told the Court that he viewed the CCTV footage after Edwin Mpimpa told him about the incident. He explained that in the footage, he saw Evans Nzima and Bright Nchima pushing the gate around 01:00 and 02:00 hours and after some time, Augustine Muleya running towards the gate.
- 6.18 Then after they put the gate back into its' original position, David Kasonda saw a car turn on its' headlights and it drove away.
- 6.19 After that, on Monday 27th December, 2021, David Kasonda was approached by a man who introduced himself as an uncle to Frank Mtonga. He testified that the man on explaining the incident, had asked to view the CCTV footage. David Kasonda testified that he allowed the man to view the same, and on viewing it, the man had asked to record the footage on his phone, and he thereafter left the premises.
- 6.20 In Frank Mtonga's submissions, the case of ***Zambia Railways Limited v Pauline S. Mundia and Brian***

Sialumba ⁽¹⁰⁾ was relied on, as regards the burden of proof. It was submitted that the evidence on record showed on a balance of probabilities, that Zizi Nets Zewdi Group Limited was the occupier of the premises, and that it was negligent, which resulted in Frank Mtonga suffering damage. Therefore, he is entitled to the reliefs sought.

- 6.21 In relation to liability on the part of Zizi Nets Zewdi Group Limited, it was submitted that Frank Mtonga visited the premises for Zizi Nets Zewdi Group Limited on 22nd December, 2021. The submission was that Zizi Nets Zewdi Group Limited's witnesses had acknowledged that they were all on duty when the incident happened, but they did not see the gate fall.
- 6.22 However, they were called to the gate after the incident happened. The CCTV footage which was at page 1 of Frank Mtonga's bundle of documents was stated as having depicted how the gate fell.
- 6.23 The submission was further that Zizi Nets Zewdi Group Limited being the occupier of the premises, it was reasonably expected that it would exercise control over the said premises.
- 6.24 Reliance was placed on the **Tort Law by Catherine Elliot and Frances Quin 7th Edition, Pearson Longman, 2009 at page 161** as stating that:

“Neither of the Acts define ‘occupier’; they state that an occupier is a person who would be treated as such under the common law. Under common

law, an occupier is the person who controls the premises. They do not have to be the physical occupier nor the owner; the critical issue is whether they exercise sufficient control to allow or prevent other people entering. In each case, the level of control exercised will be a question of fact.”

6.25 It was stated that the above is amplified in **Section 3 of the Occupiers Liability Act, Chapter 70 of the Laws of Zambia.**

6.26 As for the definition of a visitor, **Tort Law by Catherine Elliot and Frances Quin 7th Edition, Pearson Longman, 2009** was relied on, which defines a visitor as:

“A visitor is someone who has express or implied permission to enter the premises.”

6.27 Premised on the above, the submission was that in order for any occupier of premises to avoid liability, the owner should have given warning of the possible risk in the case of damage.

6.28 It was stated that in this matter, Zizi Nets Zewdi Group Limited being fully aware of the imminent threat that was posed by the gate, failed to issue any warnings concerning the gate and its' condition. As a result, the gate fell on Frank Mtonga, and it injured him.

6.29 Further submission was made, that the facts of the case could not be looked at in isolation of the principles that govern the tort of negligence.

6.30 The case of ***Blyth v Birmingham Water Works Company***

(1) was stated as having defined negligence as:

“Negligence is the omission to do something which a reasonable man, upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

6.31 As to the elements that constitute negligence, reliance was placed on the case of ***Naomi Malama v Edwin Chinda Chisenga*** (13), stating that in the matter, the four elements of negligence were stated as:

- i. duty of care;
- i. Breach;
- ii. Causation; and
- iii. Damage.

6.32 It was also submitted that the Court in that case, stated that each element is an essential component of a legal claim that must be established.

6.33 As to the duty of care and breach of that duty, the submission was that Zizi Nets Zewdi Group Limited was the owner and occupier of the premises, and whether it did in fact owe Frank Mtonga a duty of care, the question was firstly, whether or not the damage was reasonably foreseeable, and secondly, whether or not there was a relationship of proximity between Frank Mtonga, and lastly whether it is just and reasonable to impose a duty.

6.34 The case of **Attorney General v Judith Chibalabala** ⁽¹²⁾, was also relied on, as where the Supreme Court held that:

“To begin with, as correctly stated by Mrs. Mulenga, the case of Caparo Industries Plc v Dickman is very instructive. That case lays a fundamental principle of the three necessary ingredients giving rise to a duty of care. Firstly, there must be foreseeability of damage. Secondly there should exist between the party owing the duty and the party to whom the duty is owed a relationship characterized by the proximity or neighbourhood, as amply adumbrated by Lord Atkins in the classic case, Donoghue v Stevenson. Thirdly, that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the party for the benefit of the other.”

6.35 It was submitted that the witnesses for Zizi Nets Zewdi Group Limited had acknowledged at trial, that in the CCTV footage, which was at page 1 of Frank Mtonga’s bundle of documents, that Zizi Nets Zewdi Group Limited knew that the gate would fall from time to time, and that given the circumstances of the case, the damage was reasonably foreseeable.

6.36 As regards the aspect of proximity, the submission was that the case of **Donoghue v Stevenson** ⁽⁴⁾ defined a neighbour as:

“At present, I contend myself with pointing out that in English law, there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it as such, or treat it as in other systems as species of culpa, is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code would censure, cannot, in a practical world, be treated so as to give a right to every person injured by them, to demand relief. In this way, rules of law arise, which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour become in law, you must not injure your neighbour; and the lawyers’ question; who is your neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

Who then in law, is my neighbour? The answer seems to be- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts which are called in question.”

6.37 Also relied on, was the case of ***Anthony Mwanza v Kugurusu Farming Enterprises & another*** ⁽¹¹⁾, stating that in the matter, the Court referred to ***Charlesworth and Percy on Negligence London, Sweet & Maxwell 2010 in paragraph 1-01 at page 3*** as stating as follows:

“Careless conduct does not necessarily give rise to breach of duty of care, the defining characteristic of the tort of negligence. The extent of duty of care and the standard required in performance of that duty are both relevant in considering whether on any given facts, conduct which can be considered careless is actionable at law.”

CAUSATION AND DAMAGES

6.38 As regards these elements, Frank Mtonga’s submission was that the undisputed evidence both in the form of witnesses’ testimony and the documentary evidence, showed that Frank Mtonga had been left permanently disabled as a result of the gate having fallen on him.

6.39 It was stated that Frank Mtonga had testified that he had been unable to provide for his family in the way that he used to prior to the gate falling on him.

6.40 Relying on ***Tort Law by Catherine Elliot and Frances Quin 7th Edition, Pearson Longman, 2009*** at pages 96-98, the submission was that it states that in order to establish negligence, it must be proved that the Defendant’s breach of duty actually caused the damage that was suffered

by the claimant, and that the damage caused was not too remote from the breach.

6.41 It was further submitted that the Court in that case, stated that causation is established by proving that the defendant's breach of duty was as a matter of fact, a cause of the damage. That to decide that issue, the first question to be asked is whether the damage would have occurred, but for the breach of duty, and that this is known as the but for test.

6.42 Submission was made, that Frank Mtonga had not returned to normal life and his health had kept on deteriorating, as a result of the accident.

6.43 The case of ***Zambia National Building Society v Ernest Mukwamataba Nayunda*** ⁽¹⁰⁾ was stated as having held as follows:

“The essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched.”

6.44 Thus, it was stated that in view of the circumstances of the case, the inescapable conclusion was that Frank Mtonga would not have been in the state that he is, but for the accident, which was due to negligence on the part of Zizi Nets Zewdi Group Limited.

RES IPSA LOQUITUR

6.45 Submission was also made, that the nature of the facts of the case, necessitated Frank Mtonga to rely on the doctrine of res ipsa loquitor, which is a special application of the principle that there is evidence of negligence if the facts are more consistent with negligence on the part of the Defendant.

6.46 Reliance in that regard, was placed on the case of **Scott v London Dock** ⁽²⁾, stating that in that case, the Court held that:

“Where the thing is shown to be under the management of the Defendant or his servants, and accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the Defendants that the accident arose from want of care.”

6.47 Still on res ipsa loquitor, **Charlesworth and Percy on Negligence London, Sweet and Maxwell 2010 in paragraph 6-102 at page 446** was referred to, as stating that:

“The maxim is not a rule of law, it merely describes a state of evidence from which it is possible to draw an inference of negligence. It is based on common sense, its’ purpose bearing on the causation and the standard of care exercised

unknown to the claimant, but ought to be within the knowledge of the defendant.”

- 6.48 It was submitted that based on the foregoing, Frank Mtonga had established that he was a visitor at Zizi Nets Zewdi Group Limited, and he sustained personal injuries which were caused by the negligence on the part of the said Zizi Nets Zewdi Group Limited and/or breach of statutory duty, as an occupier of the premises known as Hillview Shopping Mall in Chalala Lusaka.
- 6.49 Therefore, he is entitled to damages for personal injuries, or in the alternative, damages for negligence, as well as damages for loss of earning capacity, medical expenses and out of pocket allowances.
- 6.50 In response, Zizi Nets Zewdi Group Limited, stated that when it comes to civil liability, at law, man is must be considered to be responsible for the natural and probable consequences of their actions. That to demand more of him is too harsh a rule, and to demand less, is to ignore the civilized order which requires the observance of minimum standards of behaviour.
- 6.51 This it was submitted, were the words of *Lord Viscount Simonds* in the case of ***Overseas Tankship (UK) Limited v Morts Docks & Engineering Co (The Wagon Mound Rule (3)***.
- 6.52 Further reliance was placed on the case of ***Blyth v Birmingham Waterworks Co (1)*** in which it was stated that:

“Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.”

- 6.53 The submission was that Frank Mtonga’s action is for damages for personal injuries which he sustained on 22nd December, 2021, when he was a visitor at Zizi Nets Zewdi Group Limited, and which was caused by the negligence and/or breach of statutory duty by Zizi Nets Zewdi Group Limited as occupier of the premises, known as Hillview Shopping Mall which is located in Chalala area of Lusaka.
- 6.54 Submission was made, that the particular section of the **Occupiers Liability Act Chapter 70 of the Laws of Zambia** which had been breached had not been pleaded.
- 6.55 The contention was that Zizi Nets Zewdi Group Limited did nothing imprudent and unreasonable, in the manner alleged by Frank Mtonga.
- 6.56 The submissions also touched on whether Frank Mtonga was a visitor or lawfully on the premises at the material time, and whether Zizi Nets Zewdi Group Limited owed him a duty of care whether at common law or statutory.
- 6.57 The preamble of the **Occupiers Liability Act Chapter 70 of the Laws of Zambia** was cited, and the submission was that the video footage showed that the car that Frank Mtonga was purportedly in, arrived at the premises at 00:59 hours, with

the headlights on. Then at 01:03 hours, the car headlights turned off. Then thereafter at 01:19 hours, Frank Mtonga began to look through the peep hole and at 01:26 hours, the gate was tampered with.

- 6.58 It was also submitted that at 01:26 hours, the gate was tampered with, and it became unhinged at 01:32 hours, and it fell at 01:33 hours. After that the footage ended.
- 6.59 The submission was that Frank Mtonga was not a lawful visitor, invitee, or licensee with a statutory right of entry into the premises on Wednesday at about 01:00 hours, when the gate fell on him.
- 6.60 This was submitted as being because, Frank Mtonga did not have the authority of Zizi Nets Zewdi Group Limited to leave his car within the premises, and to go and collect it after business hours.
- 6.61 The submission was that secondly, Frank Mtonga's conduct was cavalier, even assuming that he was a visitor in terms of the **Occupiers Liability Act**, as **Section 3 (2) of the Act** provides that an occupier will expect a visitor to exercise reasonable care for their own safety. Thus, by attempting to open a closed gate without authorization, Frank Mtonga failed to exercise reasonable care, thereby contributed to his injury.
- 6.62 Consequently, the contention by Frank Mtonga that Zizi Nets Zewdi Group Limited was negligent as particularised in the statement of claim was untenable. It was stated that Frank Mtonga in his evidence, failed to establish and prove the said

particulars, aside from showing that Zizi Nets Zewdi Group Limited owed him a duty of care in the sense as stated in the case of ***Donoghue v Stevenson*** ⁽⁴⁾.

6.63 In that regard, the submission was that *Lord Wilberforce*, in extending the neighbour principle as expounded in the case of ***Donoghue v Stevenson*** ⁽⁴⁾ stated that:

“The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather, the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship or proximity or neighbourhood, such that in reasonable contemplation of the former, carelessness on his part, may be likely to cause damage to the latter: in which case, a prima facie duty of care arises.

Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to be negative, or reduce or limit the scope of duty of care or the class of persons to whom it is owed or the damages which a breach of it may arise.”

6.64 This modern approach which is the incremental approach, was said to have been summarised in the case of **Caparo Industries Plc v Dickman** ⁽⁸⁾ as;

“What emerges is that, in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed, a relationship characterized by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the party for the benefit of the other.”

6.65 It was submitted that above approach focused on the relationship between the parties, and in particular the proportionality or the weight of the burden of liability, in relation to the nature of the conduct.

6.66 The submission was that in this case, there was no relationship between Frank Mtonga and Zizi Nets Zewdi Group Limited, as once the premises were closed to the public, any implied permission to visitors to enter the said premises would have been withdrawn. Consequently, any person who attempted to forcibly enter the premises would be a trespasser, which Frank Mtonga was.

6.67 Reliance was placed on the case of **Grant v Australian Knitting Mills Limited** ⁽⁵⁾ stating that his *Lordship Wright* in that matter, opined that:

“It is essential in English law, that the duty should be established; the mere fact that a man is injured by another’s act gives in itself no cause of action; if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party was merely exercising a legal right; if the act involves a lack of due care, again no cause of negligence will arise unless a duty to be careful exists.”

6.68 The submission was that the second document in Zizi Nets Zewdi Group Limited bundles of documents, being the video footage showed that the operating hours for Panthers Bar and Restaurant from Monday to Friday was from 15:00 hours until 00:00 hours.

6.69 It was submitted that Augustine Muleya testified that the duty to open the gate at 06:00 hours when the premises were opened to 22:00 hours when the premises closed, lay with the security guards who were on duty.

6.70 The submission was also that the said document in Zizi Nets Zewdi Group Limited’s bundles of documents, which was not disputed by Frank Mtonga showed that it excluded Zizi Nets Zewdi Group Limited’s liability from visitors who were lawfully on its’ premises in the instances stated in **Section 3 (4) (a) of the Occupiers Liability Act.**

- 6.71 It was submitted that there was no way that the gate could have magically fallen on Frank Mtonga in the absence of him having tempered with it. Thus, the principle of *res ipsa loquitor* was inapplicable. The submission was that Frank Mtonga caused the damage, as he acted in an unreasonable manner.
- 6.72 Reference was made to **Section 3 (2) of the Occupiers Liability Act** stating that it provides that the common law duty of care as in all circumstances of a case, is reasonable to see to it, that the visitor will be reasonably safe in using the premises for which he is invited or permitted by the occupier to be there.
- 6.73 Thus, even assuming, which was denied, that Frank Mtonga was a visitor at the premises, he could not have used the premises for the purpose for which he was invited or permitted, that is to patronize the bar for purposes of drinking.
- 6.74 On the particulars of negligence as pleaded, Zizi Nets Zewdi Group Limited's submission was that Frank Mtonga had not proved of any of the said allegations. Thus, Zizi Nets Zewdi Group Limited' was not liable to Frank Mtonga.
- 6.75 The submissions in reply reiterated the purpose of the **Occupiers Liability Act**, and it was stated that Frank Mtonga had relied on **Section 3 of the said Act**, which when applied, was to the effect that Zizi Nets Zewdi Group Limited was the occupier of Hillview Shopping Mall, and that it owed Frank Mtonga a duty of care, which was to ensure that Frank
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Mtonga and any other person who were permitted on the premises was reasonably safe, and took all necessary steps to prevent any harm or injury to visitors.

- 6.76 It was stated that Zizi Nets Zewdi Group Limited knew that the gate at its' premises was unstable, but it took no steps whatsoever to fix it, and not even at very least to warn its' visitors to take caution that the gate was unstable. Thus, the failure to do so resulted in Zizi Nets Zewdi Group Limited being in breach of its' statutory duty.
- 6.77 The submission in reply was also that Frank Mtonga was lawfully on the premises at Panthers Pub and Grill which operated as a night club. It was stated that Frank Mtonga was a frequent customer of Panthers Pub and Grill, and that he parked his vehicle in the car park at the premises.
- 6.78 It was contended that the fact that Frank Mtonga momentarily chose to leave Panthers Pub and Grill, and to return there later, entailed that he was a visitor on the premises lawfully. Further, he had informed the security guard at the premises that he was leaving his vehicle, and he would return.
- 6.79 However, on return, the premises were closed and the security guard did not respond to the horn of the car that was sounded. Thus, Frank Mtonga disembarked from the vehicle so that he could peep through the peep hole so that he could see where the security guard was. However, as he did so, the gate fell on him and he sustained injury.

6.80 In substantiating the negligence on the part of Zizi Nets Zewdi Group Limited, Frank Mtonga submitted that it was not the first time that the gate had fallen. He stated that Zizi Nets Zewdi Group Limited had not disputed that assertion at trial. Thus, it was negligent.

6.81 **Black's Law Dictionary 9th Edition by Bryan A. Garner, Thomas Reuters, 2009** at page 1133 defines *negligence* as;

“The failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregarding of other’s rights.”

6.82 **Clerk & Lindsell on Torts, 20th Edition, Thomas Reuters, 2010 at page 415 in paragraph 8-04** sets out four (4) requirements for the tort of negligence to be proved. These are;

“(1) the existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of a kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable;

(2) Breach of the duty of care by the defendant i.e. that he failed to measure up to the standard set by law;

(3) A causal connection between the defendant's careless conduct and the damage;

(4) That the particular damage to the particular claimant is not so unforeseeable as to be too remote”.

6.83 The said **Clerk and Lindsel on Torts, in paragraph 8-01** at page 413, explains negligence as:

“Negligence is recognised as a separate tort, but unlike other torts, negligence is not limited to the protection of a particular kind of interest. Rather, negligence liability is based on the conduct of the Defendant and may be imposed in respect of a wide range of interests damaged by such conduct.”

6.84 Further, **Halsbury's Laws of England, Vol 34, 4th Edition,** in paragraph 1 states inter alia:

“What amounts to negligence depends on the facts of each particular case. It may also consist in omitting to do something which ought to be done or in doing something which ought to be done in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be

reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances and may vary according to the amount of risk to be encountered and to the magnitude of prospective injury. The duty of care is owed only to those persons in the area of foreseeable danger...”

- 6.85 From the above, and the authorities that the parties cited in this case, it is clear that negligence is the breach of the duty to take care and that it may be inferred, depending on the facts surrounding a matter, which when breached causes damage. In so establishing, it must be proved that the defendant owed the plaintiff a duty of care based on the neighbour principle.
- 6.86 Further in ascertaining that a duty of care to the plaintiff existed, it must be established from the relationship between the parties.
- 6.87 In this matter, Frank Mtonga argued that Zizi Nets Zewdi Group Limited owed him a duty of care in line with **Section 3 of the Occupiers Liability Act Chapter 70 of the Laws of Zambia** as he was a visitor at premises known as Hillview Shopping Mall in Chalala Lusaka, at a place called Panthers Pub and Grill, which operated as a night club there. He argued that this duty continued even though he momentarily left Panthers Pub and Grill to go to Capelo’s at Lewanika Mall in Woodlands, and therefore, he was still a visitor at the
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premises, as he had informed the security guard at the premises that he would return to go and get his vehicle.

- 6.88 However, on his return, the gate was closed and the security guard did not respond to the sound of the hooter of the vehicle, so Frank Mtonga disembarked from the vehicle and he went to peep through the peep hole to see where the security guard was. That when he did so, the gate fell on him and it injured him.
- 6.89 The defence was that Panthers Pub and Grill had operating hours from Monday to Thursday which were from 15:00 hours until 00:00 hours, and that said was displayed at the premises. Therefore, after that operating time, Frank Mtonga was a trespasser on the premises. Moreover, he had not established the particulars of negligence as pleaded in the statement of claim and Zizi Nets Zewdi Group Limited was not liable to him in negligence.
- 6.90 It is common cause that Zizi Nets Zewdi Group Limited operated the premises in issue as Hillview Shopping Mall. On that premises, was Panthers Pub and Grill which according to Frank Mtonga operated as a night club, and Evans Julius Nzima testified that it would operate until the last customers left.
- 6.91 Frank Mtonga stated that he was a regular at Panthers Pub and Grill and he used to park his vehicle at the premises.
- 6.92 It has been seen that the defence by Zizi Nets Zewdi Group Limited was that Panthers Club used to operate up to 00:00

hours and after that time, it closed. So, Frank Mtonga was a trespasser on the premises.

6.93 No witness from Panthers Pub and Grill was called by Zizi Nets Zewdi Group Limited, to rebut Frank Mtonga's assertion that Panthers Pub and Grill operated as a night club. It relied on the video footage in its' bundle of documents as having established the operating hours for Panthers Pub and Grill.

6.94 Zizi Nets Zewdi Group Limited operated the premises as Hillview Shopping Mall. Being a shopping mall, the public who went there were expressly and impliedly visitors on the premises, as long as they went there for a lawful purpose.

6.95 As such, Zizi Nets Zewdi Group Limited was an occupier of the premises.

6.96 The preamble to the **Occupiers Liability Act Chapter 70 of the Laws of Zambia** states that:

“An Act to amend the law as to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there; and to provide for matters incidental to or connected therewith.”

6.97 Then **Section 3 of the said Act** provides that:

“3. (1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend,

restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purposes include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases-

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)-

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be

treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a

right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.”

- 6.98 The law as stated above is clear, that an occupier of premises has a duty to ensure that any visitor of their premises will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
- 6.99 The provision also states that the common duty of care does not impose on an occupier, any obligation to a visitor in respect of risks willingly accepted as his by the visitor.
- 6.100 In this case, what caused injury to Frank Mtonga was the gate at entrance of the premises known as Hillview Shopping Mall, as he attempted to return to Panthers Pub and Grill which operated at the said premises. I have noted that the defence by Zizi Nets Zewdi Group Limited was that Panthers Pub and Grill operated up to 00:00 hours, and it was closed after that.
- 6.101 The contention was that the lights for the vehicle that Frank Mtonga used, are seen in the CCTV footage which is at page 1 of Frank Mtonga's bundle of documents at 00:59 hours and therefore, Panthers Pub and Grill having been closed, Frank Mtonga was not a visitor at the premises, but was in fact a trespasser.
- 6.102 A perusal of the said CCTV footage shows that indeed the gate at the premises was closed, and there was no business

activity that could be said to have been taking place at the time.

6.103 However, being a premise that operated for use by the public, it was expected that the gate at the premises was safe. Frank Mtonga alleged that as could even be heard from the officers at the premises in the CCTV footage which is at page 1 of Frank Mtonga's bundle of documents, it was not the first time that the gate fell.

6.104 Evans Julius Nzima who testified that he worked as a security guard for Choppies Supermarket at the premises, told the Court that it was not first time that the gate had fallen. He stated that the said gate fell when he was letting out a customer who had gone there with a motor cycle, and that it fell after the customer left.

6.105 This testimony was not rebutted in any way, with Zizi Nets Zewdi Group Limited just contending that the gate had never fallen before.

6.106 It will further be noted from Evans Julius Nzima's testimony that there were a number of security guards at the premises, and he guarded at Choppies Supermarket which was on the premises.

6.107 The defence by Zizi Nets Zewdi Group Limited was that there was a security guard who was responsible for opening the gate at 06:00 hours and closing it at 22:00 hours, who in this case was Augustine Muleya, who in his witness statement, told the Court that he was employed as a security guard at Hillview Shopping Mall.

- 6.108 Augustine Muleya testified that on the material day, he was patrolling the premises when between 01:00 and 02:00 hours, when he heard someone shout that the gate had fallen. That was how he rushed there.
- 6.109 A perusal of the pictures which are in Zizi Nets Zewdi Group Limited's bundle of documents at pages 6-7 depicts the premises, Hillview Shopping Mall. It is in a wall that has a palicid fence. Therefore, one can see through it, and it has a gate.
- 6.110 The uncontroverted testimony which is on record is that the gate would fall, and Evans Julius Nzima's testimony was that it would fall outside when it did.
- 6.111 Hillview Shopping Mall being a place that the public could lawfully enter and visit, Zizi Nets Zewdi Group Limited by virtue of **Section 3 of the Occupiers Liability Act** had a duty to ensure that it was safe for its' visitors.
- 6.112 By virtue of that duty, it had to ensure that the gate at its' premises was secure, and it did not pose any safety risks to the visitors at the premises, as reasonable foreseeability.
- 6.113 As to whether the duty of care was owed to Frank Mtonga when he returned in the night at the premises to go and patronize at Panthers Pub and Grill, and to collect the vehicle that was left on the premises, the evidence establishes that the said Panthers Pub and Grill was closed at the time.
- 6.114 Further, the evidence on record shows that the guard that Hillview Shopping Mall had employed to man the premises was Augustine Muleya, and not Evans Julius Nzima whom

Frank Mtonga had informed that he had left a vehicle parked at the premises, and he would return to get it.

6.115 It has been seen that Evans Julius Nzima was employed to guard Choppies Supermarket, which was within the Hillview Shopping Mall premises. His testimony was that the gate fell when he opened for a customer who was on a motor cycle.

6.116 Therefore, while Evans Julius Nzima was a guard for Choppies Supermarket at Hillview Shopping Mall, he was given implied authority to open and close the gate at the said Hillview Shopping Mall.

6.117 As a result, Zizi Nets Zewdi Group Limited cannot successfully argue that Evans Julius Nzima had no authority to operate the gate at its' premises.

6.118 Having found that the gate at Hillview Shopping Mall was unstable and would fall, it naturally follows that there was foreseeable risk that it could fall at any time, even on a vehicle or a person, even when there was a security guard who was operating it, as seen from Evans Julius Nzima's testimony.

6.119 By Zizi Nets Zewdi Group Limited, not having repaired or replaced the gate, and it not having placed a warning on the premises to alert its' visitors at the premises, that there was risk that the gate could fall and cause injury to a person or damage to property, it was negligent.

6.120 The evidence on record shows that the gate fell on Frank Mtonga and it caused him to sustain injury. The breach of duty to keep the gate in a safe state caused damage to Frank

Mtonga as he was injured when the gate fell on him, which injury was not remote.

6.121 Zizi Nets Zewdi Group Limited's contention was that it is not liable to Frank Mtonga in negligence, as he was a trespasser at the premises. This was because Panthers Pub and Grill had closed at 00:00 hours, when he went back there at 00:59 hours, as seen from the CCTV footage which is at page 1 of Frank Mtonga's bundle of documents.

6.122 **Clerk & Lindsell on Torts, 20th Edition Sweet & Maxwell Thomson Reuters, 2010** in paragraph 12-61 defines a *trespasser* as:

“A trespasser is a person who has neither right nor permission to enter on premises, who goes on the land without the invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to. It must of course be remembered that not every trespasser is a miscreant.”

6.123 Therefore, a trespasser is one who is not defined as a visitor in the **Occupiers Liability Act**.

6.124 In the case of **British Railways Board v Herrington** ⁽⁶⁾, the House of Lords in a matter where a child trespassed and was injured on a live rail line, held that an occupier owed a trespasser a limited duty of care.

6.125 **Clerk & Lindsell on Torts, 20th Edition Sweet & Maxwell Thomson Reuters, 2010** in paragraph 12-62, however notes that this duty of care as held in the above

case, was obscure, as the level of the duty of care and how it differed from the common law duty of care was not stated.

6.126 The learned authors state that there were attempts to mark off the duty of care, by suggesting that a defendant could not be liable without the actual knowledge that trespassers were likely to be on his land.

6.127 In this matter, Panthers Pub and Grill is said to have operated up to 00:00 hours on each day, although Frank Mtonga and Humphrey Lumbwe's contention was that it operated as a night club. Evans Julius Nzima testified that it would close when the last customers left.

6.128 The CCTV footage which is at page 1 of Frank Mtonga's bundle of documents shows that at 00:59 hours, Hillview Shopping Mall was closed.

6.129 The evidence on record shows that Hillview Shopping Mall had not displayed any notice at its' premises with regard to the time that the premises were opened and were closed to visitors who could lawfully enter upon its' premises.

6.130 ***Clerk & Lindsell on Torts*** as cited above, in paragraph 12-14 states that rules of the common law, as to who a visitor is, is that it is those who enter by the express or implied permission of the occupier.

6.131 The paragraph further states that express permission causes little difficulty, and that permission may be implicit, as for example, a public part of a shop or path, or roads on a new housing estate not yet dedicated to the public, or places of public resort, such as courts or public libraries.

- 6.132 The authors also state that it may sometimes be inferred that when the public habitually use the premises to the knowledge of the occupier, and no steps are taken to prevent this, for example use of a field known by an occupier to be regularly used as a short cut. But that there will be no implied licence where the occupier takes what steps he can to assert his rights, such as warning interlopers or by fencing off his land, and keeping it properly fenced.
- 6.133 It is also stated that persons entering premises to communicate with people in them or for other lawful purposes are lawful visitors, as long as they confine themselves to that part of the premises, which provides the usual access to them, unless they are forbidden to enter either by an express prohibition or a general notice. If they stray from the usual access, they become trespassers.
- 6.134 Then in paragraph 12-16, the authors state that difficulties may arise when the claimant is permitted to enter not by the occupier himself, but by his employees. If the employee is acting within the scope of the actual authority which his employer has given him, then clearly, the entrant is a visitor and not a trespasser.
- 6.135 That with regard to an employee disobeying the employer's instructions, the case of **Stone v Taffle** ⁽⁷⁾ held that in such a case, an entrant if bona fide was a visitor, rather than a trespasser where the employee, though breaking his instructions was still in the course of his employment, according to the usual rules of vicarious liability.
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- 6.136 Accordingly, reliance on the notice that was alleged to have been at Panthers Pub and Grill on its operating hours which Frank Mtonga testified that he never saw, does not exonerate Zizi Nets Zewdi Group Limited, as that notice was specific to Panthers Pub and Grill, and not the premises as a whole.
- 6.137 While Augustine Muleya testified that he was employed by Hillview Shopping Mall as a security guard at the premises, he stated in his testimony that there were other security guards at the premises, who included Evans Julius Nzima and Bright Nchima.
- 6.138 It is on record that Frank Mtonga testified that he had informed Evans Julius Nzima that he had left a vehicle on the premises, and that he would return to collect it.
- 6.139 From the testimony that Evans Julius Nzima gave, which was not disputed in any way, he used to open and close the gate at the premises even though he was employed to guard Choppies Supermarket.
- 6.140 In defence, Zizi Nets Zewdi Group Limited did not adduce any evidence to show that Evans Julius Nzima although he guarded Choppies Supermarket at the premises, had no authority to open and close the gate at the premises.
- 6.141 It is clear that Evans Julius Nzima was a security guard on the premises, and by virtue of that, he was a person who was authorised by Zizi Nets Zewdi Group Limited to perform duties that any security guard at the premises could, which included opening and closing the gate at the premises, under the principle of vicarious liability, and I so find.
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- 6.142 The testimony that Frank Mtonga gave, which was not disputed other than Zizi Nets Zewdi Group Limited contending that Panthers Pub and Grill closed at 00:00 hours, was that in fact, Panthers Pub and Grill which he patronized regularly, operated as a night club. Evans Julius Nzima stated that it would be open until the last customers left. Frank Mtonga also testified that he would park his vehicle in the car park at the premises.
- 6.143 Panthers Pub and Grill may have stipulated its' operating hours, but it has not successfully rebutted Frank Mtonga's assertion that it operated as a night club and would close after the last customers left, and that Frank Mtonga would park his vehicle in the car park at the premises.
- 6.144 This evidence establishes that even though on the material night, Panthers Pub and Grill closed before 00:59 hours when Frank Mtonga returned there with Humphrey Lumbwe, Frank Mtonga did not return there for an unlawful purpose.
- 6.145 This is because his position was that he went to collect the vehicle that he had left parked in the car park on the premises, and he had informed Evans Julius Nzima so. Evans Julius Nzima confirmed that position.
- 6.146 As such, even though there was no business activity at Hillview Shopping Mall when Frank Mtonga returned there, and the gate was closed, Frank Mtonga went there for a lawful purpose, being to collect the vehicle that he had left parked at the premises.
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- 6.147 There is no evidence that Frank Mtonga strayed beyond the lawful boundaries of the premises, as the CCTV footage at page 1 of his bundle of documents shows that he did not even get beyond the gate, as it fell on him, and he was injured.
- 6.148 The evidence as given by Evans Julius Nzima that visitors would be on the premises until the last customer left Panthers Pub and Grill, obviously beyond the stipulated working hours, as contended by Zizi Nets Zewdi Group Limited, the said Zizi Nets Zewdi Group Limited could not have reasonably expected that there would no trespassers on its premises after 00:00 hours.
- 6.149 Further, I have found that it did not display any notice on its' premises to warn its' visitors of the times that the premises were open and closed.
- 6.150 As Frank Mtonga returned to Hillview Shopping Mall in pursuit of a lawful purpose of collecting a vehicle, that he and Humphrey Lumbwe had left on the premises, he was a visitor and not a trespasser.
- 6.151 I have said that there was no notice at Hillview Shopping Mall that restricted the time of entry onto the premises, which can lead me to infer that in fact Zizi Nets Zewdi Group Limited had exercised its' right to restrict the time of entry into its' premises, and consequently, it would not be liable to any trespassers on its' premises, if it could show that they went there for an unlawful purpose.
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7. CONCLUSION

- 7.1 Frank Mtonga was lawfully on the premises known as Hillview Shopping Mall, and the said Hillview Shopping Mall was a public place where visitors could enter in pursuance of business activities there.
- 7.2 Accordingly, there was a duty of care that Zizi Nets Zewdi Group Limited owed to the said visitors, including Frank Mtonga, to ensure that the premises were safe for such visitors, as a relationship of proximity.
- 7.3 There was further reasonable foreseeability that the gate at the premises being unstable, and it had fallen before, could fall at any time and cause injury to a person.
- 7.4 Zizi Nets Zewdi Group Limited breached that duty of care which resulted in injury to Frank Mtonga who suffered damage. The elements of negligence as pleaded by Frank Mtonga succeed, and I find Zizi Nets Zewdi Group Limited liable to Frank Mtonga for damages for personal injuries caused by the negligence and/or breach of statutory duty as occupier of the premises known as Hillview Shopping Mall in Chalala. The counterclaim fails.
- 7.5 The evidence as adduced by Frank Mtonga and with reference to his bundle of documents shows that Frank Mtonga was treated for the injuries that he sustained, and that at the time, he was in formal employment and he was earning income.
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- 7.6 However, no evidence was adduced to show the actual medical expenses that he incurred or the exact income that he earned from his employment.
- 7.7 In view of that, I refer the matter to the Registrar for assessment of the damages for personal injuries, the medical expenses, and loss of income.
- 7.8 The amounts found due shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment, and thereafter, at the Bank of Zambia lending rate until payment.
- 7.9 Having succeeded on the claims, Frank Mtonga is awarded costs, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 18th DAY OF AUGUST, 2025

S. Kaunda
**S. KAUNDA NEWA
HIGH COURT JUDGE**

